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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-482

STATE OF MICHIGAN, PETITIONER

*v.*

THOMAS W. TUCKER

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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### INTEREST OF THE UNITED STATES

The United States has a direct interest in the constitutional standards governing the admissibility of relevant evidence in criminal trials. An Act of Congress (18 U.S.C. 3501) reflects the public policy of the United States that all confessions shall be admissible in evidence if given voluntarily. While this case does not involve the admissibility of a confession, the same policy applies with equal, if not greater, force to the admissibility of evidence to which law enforcement officers are led by investigation of a voluntary statement, where such evidence is of independent probative value. Moreover, there are occasions when, because of uncertainty as to whether *Miranda* warnings need be

given or because of unintentional oversight, the fourfold *Miranda* warnings are not administered prior to interrogation by law enforcement officers employed by various agencies of the United States. Whether the exclusionary rule formulated in *Miranda* v. *Arizona*, 384 U.S. 436, is to be extended to exclude not only the statements made but probative evidence discovered as a result of those statements is, therefore, of significant concern to the United States.

## STATEMENT

The factual background of this case is set forth in the Brief for the Petitioner (pp. 4–5) and need not be restated here. We present only those facts directly relevant to the legal issues to which we address ourselves in this brief.

After being lawfully arrested for rape, respondent was interrogated by the police. Prior to the commencement of such interrogation, he was advised of his right to remain silent and his right to consult with counsel (but not his right to the appointment of counsel), in accordance with the practice then in effect.[1] Respondent related an alibi explaining his bloody appearance and told the police that at the time of the crime he was with a friend, one Robert Henderson. When the police contacted the "alibi" witness for corroboration, Henderson's statement tended instead to incriminate respondent.

[1] The interrogation took place on April 19, 1966, and *Miranda* v. *Arizona*, 384 U.S. 436, was not decided until some two months later, on June 13, 1966. Since, however, the trial here took place after *Miranda*, its principles are applicable. *Johnson* v. *New Jersey*, 384 U.S. 719, 732–733.

While respondent's statements to the interrogating officers were not admitted at trial because they failed to meet the test of the intervening decision in *Miranda,* respondent contended also that the identity of the "alibi" witness was the product of the *Miranda* violation and that his testimony should consequently have been suppressed as the "fruit of the poisonous tree." Rejecting this argument, the state courts affirmed the conviction. However, the United States District Court for the Eastern District of Michigan granted respondent's petition for a writ of habeas corpus, finding that the witness' testimony was inadmissible because of the *Miranda* violation (Pet. App. 14–21). The Court of Appeals for the Sixth Circuit affirmed, ruling that such evidence was the "fruit of the poisonous tree" (Pet. App. 13–14).

## SUMMARY OF ARGUMENT

This case involves the admissibility of evidence (the testimony of a witness) derived from investigation of a statement made to police by respondent while lawfully in custody but not fully advised of his rights as prescribed by *Miranda* v. *Arizona,* 384 U.S. 436. The case raises two analytically distinct issues: the first concerns the scope of the privilege against self-incrimination itself, which we submit does not extend to informal custodial interrogation which elicits statements that are not admitted at trial, but merely lead to other evidence; the second issue, in connection with which it is assumed that the constitutional privilege is held to apply to such interrogation, is whether the failure to give the *Miranda*

warnings should result not only in exclusion of the statements but of their fruits as well.

1. The threshold issue involves the scope of the privilege against self-incrimination as applied in the context of informal custodial interrogation. Since the purpose of the four-fold warning prescribed by *Miranda* is to insure that statements are not elicited from a suspect in violation of the self-incrimination clause, it is necessary to determine whether the same protection which is accorded to a witness compelled to testify under oath before a grand jury or a similar body—*i.e.*, a privilege against being compelled to give statements which could be used against him directly *or* as a source of other evidence—should be accorded to a person who is lawfully incarcerated and is subject to informal custodial interrogation (which does not involve any police conduct that would render the statement involuntary under traditional standards).

Our submission is that this issue differs significantly from that presented in cases such as *Counselman* v. *Hitchcock*, 142 U.S. 547, where the Court held that a claim of the privilege against self-incrimination, asserted in resisting the giving of compelled (under threat of imprisonment for contempt) sworn testimony before a grand jury, may not be overridden by a statutory grant of immunity limited to testimonial use of the compelled statements and not protecting against derivative use. We submit that *Counselman* should not be ex-

tended to cover the materially different situation here involved.

Our contention is based principally on the fact that few if any of the policies heretofore recognized by this Court to underlie the privilege against self-incrimination are adversely implicated by informal custodial interrogation which leads to the discovery of other evidence (provided, of course, that the statements are not secured through the kind of offensive police conduct recognized prior to *Miranda* as vitiating the admissibility and voluntariness of a confession). These policies, outlined by the Court in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55, include few values that are threatened by the position for which we contend. Such interrogation cannot lead to the introduction of self-deprecatory statements of questionable reliability. Nor is there any question here of use of cruel or inhumane methods to extract admissions from a suspect.

Moreover, two of the constitutional policies catalogued in *Murphy* are absent here, while present in the *Counselman* situation, thus supporting a distinction between the two situations for purposes of delineating the scope of the privilege: (1) In the case of formal testimony before a grand jury, at a trial, or in a legislative proceeding, the individual is subjected to the "cruel trilemma" of contempt, perjury, or self-incrimination, whereas in the context of informal interrogation, while statements may in some senses be

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considered "compelled", neither silence nor falsehood exposes the subject of interrogation to sanction; (2) in the *Counselman* formal proceedings context, a witness may be called to testify without any showing that his evidence is legitimately necessary to the conduct of the proceedings, so that we can have no assurance that his "zone of privacy" is being invaded justifiably; here, by contrast, a fully justified probable cause arrest of the suspect has been made, the information sought from him is demonstrably pertinent to a criminal investigation in progress, and no right of his "to be left alone" is being infringed.

Apart from the foregoing distinctions deriving from considerations of constitutional policy, we will show below that there are significant historical and analytical weaknesses in *Counselman* itself that suggest the Court should proceed with caution before electing to extend its derivative evidence prohibition to other circumstances.

2. Even if we are wrong in our analysis of the scope of the self-incrimination clause in this context, it does not follow that evidence to which law enforcement officers were led as a result of statements obtained without prior *Miranda* warnings must be excluded. While *Miranda* may have extended the protection of the self-incrimination privilege to informal custodial interrogation, it does not follow that a statement elicited without the *Miranda* warnings has thereby actually been obtained in violation of the privilege against self-incrimination. Our reading of the purpose of those warnings leads us to the conclusion that they were viewed by this Court not as part of the constitutional

mandate itself, but as a pragmatic device to help insure that the privilege is not violated; the exclusionary rule of *Miranda*, in turn, is the means by which compliance with its prophylactic procedural rule is enforced. Since, therefore, the interrogation of respondent violated these procedural rules rather than, directly, his constitutional privilege, the Fourth Amendment exclusionary rule suppressing fruits of a direct constitutional violation (*e.g., Wong Sun* v. *United States*, 371 U.S. 471) need not be applied.

Moreover, one of the principal considerations underlying the extension of the privilege against self-incrimination to custodial interrogation was to "guard against the possibility of unreliable statements" (*Johnson* v. *New Jersey*, 384 U.S. 719, 730). That factor is totally absent when statements made by an accused are not admitted and all that is at issue is the admissibility of derivative evidence, which still must be connected independently to the defendant.

Furthermore, it is unlikely that the limitation on the exclusionary rule which we here urge will have any significant impact on its efficacy in compelling compliance with the *Miranda* procedural requirements. Available empirical evidence suggests that the *Miranda* warnings have not had a substantial impact on the decision of suspects to respond to questions. In these circumstances, it is hardly likely that law enforcement officers will risk losing a confession in the speculative hope of enhancing their ability to obtain leads to other evidence, which still must be connected independently to the defendant. This is particularly true when the "derivative evidence" is a

live witness whom the law enforcement officers can never be certain will agree to provide a complete or truthful version of the events. Indeed, in the instant case, the full warnings were not given because *Miranda* had not been decided when the interrogation took place, and the defendant gave the police the name of a person he hoped would be an alibi witness. There was no guarantee that this witness would not have completely corroborated his story.

Moreover, where the "derivative evidence" is a live witness it can never be known with any degree of certainty whether or not he would have come forward or have been discovered anyway, even without the statement of the defendant. While in other contexts a full blown pre-trial hearing on this issue might be appropriate, where, as here, there has been no clear violation of the self-incrimination clause, and where the failure to exclude the evidence will have no effect on the deterrent efficacy of the *Miranda* exclusionary rule, the witness should be permitted to testify without engrafting yet another pre-trial "trial" on the criminal process.

Finally, it is clear from cases such as *Harris v. New York*, 401 U.S. 222, that the *Miranda* exclusionary rule is not absolute and all-pervasive. What is entailed in the decision whether to extend the rule to evidence that may be deemed the "fruit" of a violation of the *Miranda* procedural rules is a balancing of the various interests at stake. We submit that, in this case, the balance should be struck in favor of admissibility.[2]

[2] The issue presented by the State (Pet. 2), is concerned specifically with "derivative use" of the testimony of a live

## ARGUMENT

### I

### THE PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT VIOLATED BY CUSTODIAL INTERROGATION WHICH ELICITS STATEMENTS THAT ARE NOT ADMITTED AT TRIAL, BUT LEAD TO THE DISCOVERY OF OTHER EVIDENCE

Respondent made a statement to the police after having received a warning of rights that did not fully comply with the requirements of *Miranda* v. *Arizona*, 384 U.S. 436. That statement was not introduced in evidence against him at his subsequent trial, and it seems clear that it could not have been introduced without at least a partial overruling of *Miranda* or of *Johnson* v. *New Jersey*, 384 U.S. 719, which held *Miranda* applicable to all trials occurring, as respondent's did, after the date of the *Miranda* decision. However, as a result of their investigation of the accuracy of respondent's exculpatory explanation of the damaging evidence that he was badly scratched, the police questioned witness Henderson and learned from him of damaging admissions that respondent had made. The testimony of Henderson regarding

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witness, and this case could be decided on that ground alone (see pp. 36–38, *infra*). Our argument is, however, principally addressed to the broader question of derivative use of any kind of evidence, inanimate as well as animate. We view this approach as appropriate because we deem an analysis of the general question of derivative use to be essential to a consideration of live witness testimony. We believe that the principal considerations that dictate reversal of the judgment of the court of appeals apply with full force to all types of derivative evidence.

these admissions was used at the trial, and the conformity of that use to the requirements of the Fifth Amendment and of the *Miranda* decision are at issue here.

The issue presented in the instant case was not ruled upon in the otherwise comprehensive *Miranda* decision, and *Miranda* need not be overruled or modified in any of its holdings in order to sustain the constitutionality of respondent's conviction (see pp. 42–44, *infra*). Broadly viewed, the essential issue here presented is whether the holding of *Counselman* v. *Hitchcock*, 142 U.S. 547, should be extended to apply to the context of informal custodial police interrogation. *Counselman* held that a claim of the privilege against self-incrimination asserted in resisting the giving of compelled (under threat of imprisonment for contempt) sworn testimony before a grand jury may not be overridden by a statutory grant of immunity limited to testimonial use of the compelled statements and not protecting against derivative use of such compelled testimony. We submit that *Counselman* should not be extended to cover the materially different situation here involved.

Our contention is based principally on the fact that few if any of the policies heretofore recognized by this Court to underlie the privilege against self-incrimination are adversely implicated by informal custodial interrogation of which only derivative use is made (provided, of course, that the statements are not secured through the kind of offensive police conduct recognized prior to *Miranda* as vitiating the admissibility

and voluntariness of a confession). These non-implicated policies include at least two that are operative in the *Counselman* situation (see pp. 16, 17–18, *infra*), thus providing a sound basis for differentiating the present case from *Counselman*. Moreover, apart from the analytic bases for distinction, we will show below that there are significant historical and analytical weaknesses in *Counselman* itself that suggest that the Court should proceed with caution before electing to extend its derivative evidence prohibition to other circumstances.

### A. THE HOLDING OF COUNSELMAN V. HITCHCOCK SHOULD NOT BE EXTENDED TO DERIVATIVE USE OF STATEMENTS MADE DURING INFORMAL CUSTODIAL INTERROGATION

The circumstances which prompted the adoption of the self-incrimination clause have been detailed in opinions of this Court and the writings of commentators.[3] Essentially, this history reveals that the privilege was aimed at the evils of the Inquisition and the Star Chamber. It was designed to prohibit the government from compelling incriminating testimony under oath. In a more refined sense, "[t]he distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications'

[3] See, *e.g.*, *Ullmann* v. *United States*, 350 U.S. 422, 428; *Brown* v. *Walker*, 161 U.S. 591; *Quinn* v. *United States*, 349 U.S. 155, 161–162. See also Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1–23 (1949); Levy, *Origins of the Fifth Amendment* (1968); VIII Wigmore, *Evidence*, § 2250, pp. 267–295 (McNaughton Rev. 1961); Friendly, *Benchmarks*, pp. 270–271 (1967).

or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Schmerber* v. *California,* 384 U.S. 757, 764. And, of course, it is the introduction of a defendant's own testimony that is expressly proscribed by the Fifth Amendment's textual mandate that no person "shall be compelled in any criminal case to be a witness against himself." See *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 75–76.

Against this background, if this Court were writing on a clean slate, it could be cogently argued that while compelled responses of an accused are "testimonial" and should accordingly be barred from use at trial,[4] leads derived therefrom, which are not in and of themselves the "testimonial" statements of the accused, should be held to be outside the protective scope of the self-incrimination clause. Indeed, at common law, at the time of the adoption of the Constitution, it was settled that the fruits of improperly obtained confessions were admissible at the trial of the accused. *The King* v. *Warickshall,* 1 Leach 263, 168 Eng. Rep. 234 (1783); *The*

[4] Compare *Massiah* v. *United States,* 377 U.S. 201, 207: "We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial" (emphasis in original).

*King* v. *Lockhart*, 1 Leach 386, 168 Eng. Rep. 295 (1785).[5]

We recognize, however, that since the decision in 1892 in *Counselman* v. *Hitchcock*, 142 U.S. 547, it has been accepted in the United States that the privilege against self-incrimination protects a person from being compelled (under threat of contempt) to give testimony before a grand jury, if the testimony could be used directly to convict him of a crime *or* if it could lead to the discovery of other evidence which may be used to convict him. Since *Miranda* holds, in considering the admissibility of the statements themselves, that statements made during informal custodial interrogation are presumptively to be deemed compelled unless preceded by the full warnings prescribed in that decision and a clear, knowing, affirmative waiver of rights, the combination of *Miranda* and *Counselman* would appear, in dry logic, to catalyze a Fifth Amendment prohibition against derivative use of such statements (rather than the more limited prohibition established in *Miranda* against the *testimonial* use of the statement itself).

On the other hand, as Judge Friendly has observed in his incisive essay on the *Miranda* decision, if the privilege "in Wigmore's phrases, guards against the employment of legal process 'to extract *from the person's own lips* an admission of guilt, which would thus

[5] "The courts have always assumed that the meaning of the constitutional [self-incrimination] clause is determined by the common law." Levy, *Origins of The Fifth Amendment*, p. 429 (1968).

take the place of other evidence' or to require him to produce documents or chattels wherein he assumes 'moral responsibility for truth telling,' inquiry designed to elicit unsworn answers leading to other culprits or to real evidence not in the suspect's possession but not themselves offered in evidence would not be covered; although a suspect's answers are indeed 'testimonial' insofar as they implicate him and would thus be banned as such, their use merely to find other evidence establishing his connection with the crime differs only by a shade from the permitted use for that purpose of his body or his blood."[6] Friendly, *Benchmarks*, p. 280 (1967).

Since, as Judge Friendly concludes, "th[is] case lies between what the state clearly may compel and what it clearly may not, a strong analytical argument can be made for an intermediate rule whereby although it cannot require the suspect to speak by punishment or force, the non-testimonial fruits of speech that is excludable only for failure to comply with the *Miranda* code could still be used" (*ibid.*). We urge the adoption of such an "intermediate rule" here.

Limitation of the *Miranda* prohibition to testimonial use of the statements themselves would not undermine to any significant degree the values reflected by the privilege against self-incrimination. These values were comprehensively catalogued by the Court in *Murphy* v. *Waterfront Commission*, *supra*, 378 U.S. at 55:

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[6] Judge Friendly was here alluding to the decision, rendered one week after *Miranda* in *Schmerber* v. *California*, 384 U.S. 757.

> The privilege against self-incrimination "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.'" *Ullmann* v. *United States,* 350 U.S. 422, 426. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States* v. *Grunewald,* 233 F. 2d 556, 581–582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn* v. *United States,* 349 U.S. 155, 162. [Footnote omitted.]

The informal custodial interrogation at issue here—which involved use neither of "third degree" techniques nor of any other tactics that would render a

confession involuntary under traditional standards—does not to any significant degree implicate these important policy considerations:

*1. The "cruel trilemma"*

Perhaps the most significant analytic distinction between the instant case and the *Counselman* context is that respondent, had he chosen to remain silent or (as he in fact did) make a false statement, was free to do so without exposure to the "cruel trilemma of self-accusation, perjury or contempt," the first of the values enumerated in *Murphy* as underlying the self-incrimination privilege. This vital difference supports a refusal to extend *Counselman* back from the courtroom, grand jury chamber, or legislative hearing room to the informal custodial interrogation context.

*2. Inhumane treatment*

This is a truly important concern, although whether it is actually native to the self-incrimination provision of the Fifth Amendment or has arrived there by a marriage with fundamental due process notions is a debatable proposition (see dissenting opinion of White, J., in *Miranda, supra,* 384 U.S. at 527–528). It is implicated neither in the present case nor in the *Counselman* situation, although the possibility of such abuses being perpetrated (and going undetected) is, while still somewhat remote, greater in the case of informal police interrogation than in more formal pro-

ceedings of the kind considered in *Counselman*.[6a] We do not believe, however, that the entirely appropriate aversion to such tactics warrants a *per se* rule which in effect presumes that such misconduct has occurred where, as here, it is palpably clear that the presumption does not correspond to reality.

*3. Privacy values*

Since there was compelling evidence pointing to the respondent's involvement in this brutal offense, and probable cause to justify his arrest, it cannot be urged seriously that his interrogation offends "our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him' " or unfairly infringes on his right "to a private enclave where he may lead a private life." [7] Such interrogation is again different from that involved in the grand jury proceeding in *Counselman*, or from interrogation by a legislative committee, where witnesses are required to appear without any showing of probable cause to believe they have committed an offense or that they have any relevant information to convey.

[6a] We would agree that, on due process grounds, a comprehensive exclusionary principle, reaching fruits as well as statements themselves, is appropriate to deter such illegal and offensive police interrogation tactics.

[7] Cf. *In re Horowitz*, 482 F. 2d 72, 85 (C.A. 2), certiorari denied, 414 U.S. 867: "[N]o Supreme Court decision has upheld a Fifth Amendment claim predicated solely, or even primarily, on the basis of an invasion of privacy."

*4. Concern with unreliability of confessions*

Finally, interrogation that leads only to other evidence, which still must be connected to the accused by independent evidence, cannot possibly lead to abuses which will undermine the "protection to the innocent" which the self-incrimination clause provides.[8] Likewise, since, we are not dealing with interrogation which will result in the admissibility of any statements made by a defendant, there need to be no concern about the trustworthiness of "self-deprecatory statements"[9] (here, of course, the statements were exculpatory). That this concern was critical to extension of the privilege against self-incrimination to custodial interrogation[10] is borne out by the discussion of the purpose

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[8] Professor Wigmore outlined these abuses in Section 2251 of his treatise (VIII Wigmore, *Evidence* (3d ed. 1940)):

"If there is a right to an answer, there soon seems to be a right to the expected answer,—that is to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately the innocent are jeopardized by the encroachments of a bad system. * * * For the sake, then not of the guilty but of the innocent accused, and of conservative and healthy principles of judicial conduct, the privilege should be preserved."

[9] This concern was specifically alluded to in *Miranda*, *supra*, 384 U.S. at 455, n. 24, 457, 478. Mr. Justice White in his dissent attributed the "underpinning" of the holding in *Miranda* to the majority's "deep-seated distrust of all confessions" (384 U.S. at 537). See also Friendly, *Benchmarks*, *supra*, at 281–282:

"No matter how many explanations are offered, there can be no real doubt that a prime motive for extending the privilege to out-of-court proceedings must have been the Court's belief that the traditional due process approach did not sufficiently protect against the truly dreadful risk of the false confession."

[10] At common law at the time of the adoption of the Constitution, informal interrogation (not under oath) was permitted

of the *Miranda* rule in *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 729–730:

> [The *Miranda* warnings] are designed in part to assure that the person who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. In this respect the rulings secure scrupulous observance of the traditional principle, often quoted but rarely heeded to the full degree, that "the law will not suffer a prisoner to be made the deluded instrument of his own conviction." Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion. [Footnote omitted.]

As Judge Friendly has observed (*Benchmarks*, *supra*, at 282):

> Although many citizens devoted to the Bill of Rights may not agree that a "fair state-individual balance" requires the government "to shoulder the entire load" in the investigation as

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during the course of a criminal investigation, and confessions or admissions so obtained were admissible unless it was shown that they were coerced. Levy, *Origins of the Fifth Amendment*, pp. 325–332 (1968). As late as 1951, the Court left open the issue "[w]hether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from a rule that forced confessions are untrustworthy * * *." *United States* v. *Carignan*, 342 U.S. 36, 41. See also Friendly, *Benchmarks*, *supra*, at 271, n. 24.

> it does in the prosecution of crime, few will deny that one innocent man sent to his death or to a long prison term because of a false confession is one too many. There is thus good reason to impose a higher standard on the police before allowing them to use a confession of murder than a weapon bearing the confessor's fingerprints to which his confession has led; doubtlessly this is the reason why fruits of a confession "not blatantly coerced" are admitted in England, India, and Ceylon, countries on whose experience the *Miranda* opinion relied.

*5. The relative roles of the state and the individual in the investigation and prosecution of crime*

Of the values identified in *Murphy* as underlying the privilege against self-incrimination, the only ones even arguably implicated by a holding permitting custodial interrogation that leads to other evidence are the policy that "the government in its contest with the individual * * * shoulder the entire load" and, to a very limited extent, our "preference for an accusatorial rather than an inquisitorial system." But, of course, it is by now well established that an individual may indeed be compelled, notwithstanding these values, to give evidence (albeit of a non-testimonial nature) that may assist law enforcement authorities in convicting him of a crime. See, *e.g., Schmerber* v. *California*, 384 U.S. 757 (blood samples); *Gilbert* v. *California*, 388 U.S. 263 (handwriting exemplars); *United States* v. *Dionisio*, 410 U.S. 1 (voice exemplars). As this Court observed in *Schmerber*, "the privilege [against self-incrimination] has never been

given the full scope which the values it helps to protect suggest" (384 U.S. at 762).

Certainly interrogation which elicits leads to other evidence does not offend those values any more than the compulsory taking of blood samples, fingerprints, or voice exemplars, all of which may be compelled in an "attempt to discover evidence that might be used to prosecute [a defendant] for a criminal offense" (*id.* at 761). To quote again from *Benchmarks, supra,* (p. 282):

> Although reception of fruits would indeed violate what have been called "theological" bases for the privilege, these are hopelessly inconsistent with *Schmerber.*

Finally, the non-extension of *Counselman* is supported by another distinction between informal custodial interrogation and the more formal context of grand jury or similar proceedings—a distinction which relates not so much to the values fostered by the privilege as to the preconditions for its invocation. In *Counselman* and similar situations, a formal, express assertion of the privilege is required before the testimony sought may be withheld. Even in coerced confession cases, the assertion of the privilege, although not formal or express, may readily be inferred from the need to use physical or psychological coercion to elicit a statement. In *Miranda*, for the first time, the Court abandoned the requirement that some reasonably clear demonstration of unwillingness to speak precede the draping of the protective cloak of the privilege (*United States ex rel. Vajtauer* v. *Commissioner*

*of Immigration*, 273 U.S. 103, 113);[11] it substituted instead, for cases of informal custodial interrogation, an irrebuttable presumption that the privilege has been asserted and overborne whenever the statement has not been preceded by the full warning of rights and an express waiver. We do not here question the validity of the considerations that motivated the Court's "waiver" of the requirement that there be actual compulsion overcoming a perceptible assertion of the privilege (express or reasonably inferrable) in order for the constitutional protection to accrue. We do, however, suggest that those considerations are not significantly implicated by custodial interrogation that results in responses which, although they may lead to other evidence, are not admitted at trial.

We emphasize again that the "intermediate rule" which we advocate is limited solely to informal custodial interrogation which involves neither third degree tactics nor other forms of interrogation that would render any statement involuntary under the traditional test. It applies only where, as here, the informal custodial interrogation standing alone is not regarded as an activity that society has any interest deterring.[12] (Indeed, there may be occasions where there is compelling interest in such interrogation, such as where it is directed to the discovery and termina-

[11] The necessity for such an assertion of the privilege was recently reaffirmed in *United States* v. *Kordel*, 397 U.S. 1.

[12] The distinction was noted by Chief Justice Traynor in a

tion of an ongoing criminal activity such as a kidnapping or extortion.) It is in these circumstances that so few—if any—of the values reflected by the self-incrimination clause are implicated.

B. THE COUNSELMAN DECISION ITSELF OFFERS A WEAK FOUNDATION FOR EXTENSION OF THE PRIVILEGE IN OTHER CONTEXTS TO ENCOMPASS DERIVATIVE EVIDENCE.

*Counselman* v. *Hitchcock* held that a "witness is protected 'from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him'" (142 U.S. at 585). We have shown in the preceding discussion that the instant case is distinguishable from *Counselman* and other cases in which witnesses have been subpoenaed to appear before an inquisitorial body such as a grand jury or a legislative committee. But even if the Court should disagree with that analysis, *Counselman* should not be extended beyond the type of case with which it specifically dealt without a fresh consideration of the valid-

somewhat different context in *People* v. *Varnum*, 59 Cal. Reptr. 108, 427 P. 2d 772, 776:

"Unlike unreasonable searches and seizures, which always violate the Constitution, there is nothing unlawful in questioning an unwarned suspect so long as the police refrain from physically and psychologically coercive tactics condemned by due process and do not use against the suspect any evidence obtained."

ity of its holding. Cf. *Grosso* v. *United States*, 390 U.S. 62, 76 (Stewart, J., concurring). The rationale upon which the *Counselman* holding rests, it is respectfully submitted, is simply inadequate to support the broad reading of the scope of the self-incrimination clause there announced. And, indeed, the dictum in *Counselman* that only transactional immunity can overcome a claim of privilege has already been overruled. *Kastigar* v. *United States*, 406 U.S. 441.

Although the holding in *Counselman* regarding the scope of the privilege against self-incrimination has been cited on repeated occasions,[13] that holding was supported by little in the way of persuasive authority or analysis. Initially, the opinion in *Counselman* engaged in an exhaustive but inconclusive analysis of state court holdings. All that this established was that those state courts that had construed constitutional provisions worded in language not significantly different from the Fifth Amendment had held that limited use immunity (of the kind afforded by the Act of Congress held unconstitutional in *Counselman*) would suffice to overcome the claim of privilege,[14] whereas those

[13] See, *e.g.*, *Kastigar* v. *United States*, 406 U.S. 441, 454; *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 78–79.

[14] An example of such a case is *People ex rel. Hackley* v. *Kelly*, 24 N.Y. 74, 83–84, where it was held:

"If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition and not any want of humanity in the law. If a witness objects to a question on the ground that an answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission on his

state courts that had construed constitutional provisions providing protection to a witness against being compelled to "accuse or furnish evidence against himself" (rather than simply affording a privilege against being compelled to be a witness against one's self), held that a limited use immunity statute was insufficient.[15]

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own trial, would tend to prove him guilty of a criminal offence. If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged. It is not within any reasonable construction of the language of the constitutional provision."

[15] An example of such a holding is *Emery's Case*, 107 Mass. 172, 182, in which it was held:

"The third branch of the provision in the Constitution of Massachusetts, 'or furnish evidence against himself,' must be equally extensive in its application; and, in its interpretation, may be presumed to be intended to add something to the significance of that which precedes. Aside from this consideration, and upon the language of the proposition standing by itself, it is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the *corpus delicti* itself.

"Both the reason upon which the rule is founded, and the terms in which it is expressed, forbid that it should be limited to confessions of guilt, or statements which may be proved, in subsequent prosecutions, as admissions of facts sought to be established therein."

After reviewing these cases, Mr. Justice Blatchford wrote (142 U.S. at 584–585):

> But, as the manifest purpose of the constitutional provisions, both of the States and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation; and that where the constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject shall not be "compelled to accuse or furnish evidence against himself," such a provision should not have a different interpretation from that which belongs to constitutions like those of the United States and of New York, which declare that no person shall be "compelled in any criminal case to be a witness against himself."

Having thus announced the necessity for a rule of uniformity,[16] the opinion in *Counselman* states (*id.* at 585):

> Under the rulings above referred to, by Chief Justice Marshall and by this court, and those in Massachusetts, New Hampshire, and Virginia, the judgment of the Circuit Court in the present case cannot be sustained. It is a reasonable construction, we think, of the

[16] Since the self-incrimination clause of the Fifth Amendment was not then binding on the states, it is difficult to understand this reliance upon a desire for uniformity.

> constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him." *Emery's Case,* 107 Mass. 172, 182.

This reasoning would be open to serious question even in a traditional Fifth Amendment context. The holding of the state cases, and particularly *Emery's Case,* may be distinguished by the peculiar language of the self-incrimination provisions there in issue. Moreover, *Boyd* v. *United States,* 116 U.S. 616, which was the opinion "of this court" to which the opinion in *Counselman* referred, set out the since discredited "mere evidence" rule and rested to a substantial degree on the notion that such evidence could not even be obtained pursuant to a search warrant, which involves no compulsion on the individual to speak. There is little in *Boyd* which survives today to support the holding in *Counselman* v. *Hitchcock.*[17]

The opinion of Chief Justice Marshall in *United States* v. *Burr,* 25 Fed. Cas. 38, to which *Counselman* also referred, stands only for the proposition that a witness may not be compelled to give testimony which

[17] *Boyd* still stands as authority for the holding that the privilege against self-incrimination may be asserted in response to a subpoena to produce private books and records. But that is because, by responding to a subpoena, the individual would in effect be admitting that the documents are his. See *Schmerber* v. *California,* 384 U.S. 757, 763–764.

is by itself sufficient to convict *or* which would form a "link" in the "chain of *testimony* which is necessary to convict any individual of a crime" (*id.* at 40; emphasis added). Counsel for the United States had argued in *Burr* that "a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime." Rejecting that arguement, Chief Justice Marshall stated (*ibid.*):

> This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

Since, at the time of Chief Justice Marshall's ruling, there was no statute on the books conferring immunity from subsequent admission in evidence against the wit-

ness of the testimony itself, this statement cannot be read to provide support for the broader holding in *Counselman* that even if the statement is not admitted at all, the witness is privileged to refuse to answer a question if his responses might lead to other evidence.

Under these circumstances, it is not surprising that *Counselman* has been severely criticized as an aberration occasioned by peculiar phrases in state constitutions and not compelled by the self-incrimination clause itself (Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1, 205–206 (1930)), and that its holding that only transactional immunity will suffice to overcome a claim of privilege has been overruled. *Kastigar* v. *United States*, 406 U.S. 441.

While the rationale of *Counselman* is no longer strong enough to support the holding,[18] a new line of authority exemplified by *Schmerber* v. *California*, 384 U.S. 757,[19]

[18] We are not suggesting that no rational basis can be advanced for the holding in *Counselman*, simply that none really was in that opinion. Certainly it is well within the legitimate province of this Court to determine, upon a consideration of the values underlying the constitutional policy regarding compelled self-incrimination, that distaste for the "cruel trilemma" adverted to in *Murphy* v. *Waterfront Commission*, *supra*, is a consideration of sufficient magnitude to outweigh the interest of society in making limited (derivative) use of evidence thereby obtained. But such a conclusion should be based on candid consideration of the conflicting values at stake in the inquiry. As previously discussed, it does not appear to us that those values can properly be deemed to dictate a conclusion that the privilege forbids derivative use of statements obtained by informal custodial interrogation.

[19] See also *United States* v. *Dionisio*, 410 U.S. 1; *United States* v. *Mara*, 410 U.S. 19; *California* v. *Byers*, 402 U.S. 424.

has evolved. Such cases permit the compulsory production of evidence such as blood samples, fingerprints, and voice exemplars in "an attempt to discover evidence that might be used to prosecute him for a criminal offense" (*id.* at 761).[20] There is a marked tension, to say the least, between the rationale of *Schmerber* and its progeny, and the holding of *Counselman* that the self-incrimination clause is offended if an individual is "compelled" [21] to make statements in "an attempt to discover evidence that might be used to prosecute him for a criminal offense." As Judge Friendly has written (*Benchmarks, supra,* at 277):

> What is so difficult to reconcile from the standpoint of an ordered society is the uncompromising rigidity concerning what can be taken from a man's mouth in the form of speech with this commonsensible view concerning what can be taken from it in the form of saliva.

We hasten to reemphasize that there is no occasion in this case to reconsider the holding in *Counselman,* because the facts here are plainly distinguishable. We have treated the issue at some length only to demonstrate that, whatever vitality the holding still retains, it should not be extended.

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[20] See also *California* v. *Byers*, 402 U.S. 424, where, in sustaining the constitutionality of a "hit and run" accident report statute against a Fifth Amendment challenge, Chief Justice Burger stated (402 U.S. at 434):

"Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence."

[21] In using the word "compelled" we emphasize that we are not referring to compulsion by techniques of physical or psychological coercion which would violate the due process requirement.

## II

### EVEN IF THE SELF-INCRIMINATION CLAUSE PROTECTS AGAINST CUSTODIAL INTERROGATION WHICH LEADS TO OTHER EVIDENCE, THE FAILURE TO COMPLY WITH *MIRANDA* SHOULD NOT COMPEL THE SUPPRESSION OF SUCH EVIDENCE

1. In the preceding argument we have contended that, in the context of informal custodial interrogation, the privilege against self-incrimination is not a bar to interrogation which elicits statements that lead to other evidence, provided the statements themselves are not admitted at the trial of the accused. If we are wrong in our analysis of the scope of the self-incrimination clause, and if our submission regarding the extension of *Counselman* to informal custodial interrogation is rejected, it does not follow that the exclusionary principle applied in *Miranda* to the statements themselves must be applied equally to derivative evidence discovered through investigation of statements taken without full compliance with *Miranda*. Our submission is based on our understanding of the scope of the holding of *Miranda* and the purpose of the four-fold warning.

We do not believe that the Court intended the requirements enunciated in *Miranda* to be considered indispensable constituents of the privilege against self-incrimination itself. Rather, this Court simply set new standards governing the admissibility of statements made by accused persons during custodial interrogation. Without abandoning the premise that a statement voluntarily made is admissible at trial, the Court instituted a presumption of involuntariness where the suspect makes a statement without first

having been fully advised of his right to counsel and his right to remain silent. The critical concern of the Court was the dangers inherent in "incommunicado" interrogation. 384 U.S. at 445. Upon exhaustive analysis of commonly employed investigatory techniques, it found that, despite all official efforts at reform, sophisticated police practices, primarily psychological in nature, were still being employed to extract confessions. *Id.* at 445–454.

Moreover, in discussing confessions obtained in incommunicado, police-dominated atmospheres, the Court pointedly noted: "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent * * *" (*id.* at 457).

As the Court thereafter phrased it in *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 729–730:

> Our opinion in *Miranda* makes it clear that the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice. * * * They are designed in part to assure that the person who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. In this respect the rulings secure scrupulous observance of the

> traditional principle, often quoted but rarely heeded to the full degree, that "the law will not suffer a prisoner to be made the deluded instrument of his own conviction." Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion.

Of course, as we have previously shown, where evidence sought to be suppressed is not the confession or statement but other evidence obtained as a result, there is no danger that the defendant will be convicted on the basis of his own suspect confession.

Equally significant to our present argument is the implicit recognition of the Court that not every statement obtained without the *Miranda* warnings suffers from such a defect or can reasonably be said to have been in fact compelled in violation of the self-incrimination clause. An absolute rule mandating the exclusion of statements obtained without the warnings was deemed necessary because of the apparent practical difficulties in determining whether, in a given case, the self-incrimination clause has been violated.[22]

[22] As respondent observes (Br. 30):

"The system which has developed operates in secret, without courtroom safeguards or a record being made, and with judicial review highly limited. Even when conducted without overt pressure, the balance in interrogation is weighted heavily in favor of the interrogator."

See also *Miranda* v. *Arizona*, *supra*, 384 U.S. at 445:

"The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado."

As an exclusionary rule designed to compel compliance with a pragmatic procedural rule not itself mandated by the Constitution but rather intended to assure that the self-incrimination clause is not violated, the *Miranda* exclusionary rule is significantly different from other exclusionary rules designed to deter conduct "which always violate[s] the Constitution." *People* v. *Varnum, supra* 427 P.2d at 776 (Traynor, J.).

Under these circumstances—given the absence of any concern regarding the credibility of "self-deprecatory statements" and the fact that it is at best speculative whether the statement made by respondent was in fact taken in violation of his privilege against compelled self-incrimination—respondent has failed to overcome the burden of justifying the exclusion of highly relevant evidence, not consisting of statements obtained from his lips, which establishes his complicity in a brutal crime. As Mr. Justice Frankfurter observed in *Nardone* v. *United States,* 308 U.S. 338, 340, "[a]ny claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land." No such justification has been demonstrated here.

2. These considerations aside, we note that, even where an exclusionary rule is otherwise justified, such a rule is generally "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra,* No. 73–734, decided January 8, 1974, slip op. p. 10. This determina-

tion necessarily involves a "balancing process" in which the likelihood of deterrence is weighed against the damage done to our system of justice by the exclusion of relevant evidence (*ibid.*).

It seems reasonably clear, based on empirical evidence, that the extension of the exclusionary rule to the fruits of a statement taken without compliance with *Miranda* is not likely to undermine the deterrent effect of the exclusionary rule. If studies which have shown that the giving of *Miranda* warnings has had little effect on the decisions of most criminal defendants to speak[23] are correct, it is unlikely that law enforcement officers will risk losing the use of a full confession in the speculative hope of obtaining derivative evidence (which they will still have to connect to the defendant by evidence independent of his statement).[24]

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[23] Note, *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L. J. 1519 (1967); Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 Yale L. J. 300 (1967); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. Pitt. L. Rev. 1 (1967); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347 (1968); Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv. L. Rev. 42 (1968).

[24] There is one type of situation where such interrogation would be worth the risk, and that is where there is a paramount interest in interrupting an ongoing, serious criminal activity—for example where one of several kidnappers is apprehended and asked for the location of the place where the victim is held. In that situation, we respectfully question the policy of deterring interrogation which is not otherwise offensive. And if we accept the notion that such interrogation is not constitutionally foreclosed, it would seem strange to hold that, after such a suspect disclosed the hiding place, the victim could not identify

Indeed, the cases in which the *Miranda* warnings are not fully given usually involve interrogation under circumstances where it is uncertain that the warnings are required (*United States* v. *Castellana,* C.A. 5, No. 73–2259, decided January 17, 1974) or where law enforcement officers are simply careless in administering all of the warnings (*United States* v. *Carneglia,* 468 F.2d 1084 (C.A. 2)), or in cases such as the instant case, where the interrogation took place prior to *Miranda.* Manifestly, in such cases, an exclusionary rule applicable to "fruits" can have little if any deterrent value.

Under these circumstances, it is respectfully submitted there is no justification for extending the exclusionary rule to fruits of statements obtained without full compliance with *Miranda's* procedural rules.

3. The foregoing discussion has been directed to "fruits" generally, without distinguishing between inanimate derivative evidence and live witnesses. What we have said above regarding the likelihood that law enforcement officers would risk losing a full confession in hope of obtaining tangible evidence applies with even greater force when the "fruit" is a live witness, for in such a situation there is no guarantee that, even if the witness has relevant information, he will willingly make full or truthful disclosure. As Chief Justice (then Judge) Burger has observed:

> [T]he living witness is an individual human personality whose attributes of will, perception,

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him as one of the kidnappers, or that his fingerprints found at that location could not be introduced in evidence. Yet this is the import of the holding below.

> memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence. [*Smith* v. *United States*, 324 F.2d 879, 881–882 (C.A.D.C.), certiorari denied, 377 U.S. 954.]

Moreover, where the "derivative evidence" is a live witness, it becomes more difficult to say with any certainty that the witness would not have been discovered "but for" the allegedly improper conduct—*i.e.*, that his testimony is in fact "derived" from the improperly obtained statement. Accordingly, some courts of appeals have adopted a case by case approach. As Chief Judge Bazelon wrote in *Smith* v. *United States*, 344 F.2d 545, 547 (C.A.D.C.), quoting *McLindon* v. *United States*, 329 F. 2d 238, 241, n. 2 (C.A.D.C.):

> "In each case the court must determine how great a part the particular manifestation of 'individual human personality' played in the ultimate receipt of the testimony in question. Indications in the record that mere knowledge of the witness' identity would not inevitably guarantee that his testimony would be favorable to the prosecution; that the witness might eventually have voluntarily gone to the police even without their knowing his identity; that his testimony has remained unchanged from the start—all are relevant factors to be considered in determining the final outcome."

While it may be possible in some cases to conclude with assurance that such a witness would or would not have come forward or been discovered without the defendant's statement, or that the taint has or has not

been attenuated, we submit that, at least where, as here, the improper conduct did not itself violate the Constitution, and where the application of an exclusionary rule would not substantially affect the conduct of law enforcement officers, it is unnecessary to create yet another pre-trial "trial," the outcome of which is dependent on a difficult assessment of the motivation of a particular witness. See *Harrison* v. *United States*, 392 U.S. 219, 224–225.[25] Such a witness should be permitted to give his testimony at trial unless the conduct which led to his discovery is offensive to due process values, so that no possible dilution of the deterrent efficacy of the exclusionary rule should be sanctioned.

4. We advocate no novel proposition. On the contrary, the position which we espouse is fully consonant with established principles of the western legal tradition and of the common law. England, for example, does not observe a rigid exclusionary rule with respect to unlawfully obtained evidence, but generally admits

[25] In *Harrison* v. *United States*, 392 U.S. 219, 223, n. 9, a case in which it was held that the testimony of the defendant at his first trial was the fruit of an illegally obtained confession and therefore could not be introduced at his retrial (the confession was the product of interrogation undertaken after the defendant should have been but was not promptly arraigned), the Court specifically held: "We have no occasion in this case to canvass the complex and varied problems that arise when the trial testimony of a witness other than the accused is challenged as 'the evidentiary product of the poisoned tree.'"

We hasten to add that there is no occasion "to canvass the complex and varied problems" that would be posed by this question in a pure Fifth Amendment case. Compare *McMann* v. *Richardson*, 397 U.S. 759. For that is not the issue here. What is here involved is the implementation of the underlying purpose of the Amendment by mandatory warnings that this Court found necessary to adopt in *Miranda*.

all reliable, relevant evidence, however obtained, subject to the discretion of the trial judge to exclude evidence gathered in a manner thought to be "unfair" to the defendant, as, for example, by trick. *Kuruma* v. *The Queen*, [1955] A.C. 197, 203–204 (P.C.), [1955] 1 All Eng. Rep. 236 (Kenya).

With respect to statements of a defendant, the traditional standard of admissibility in British courts is trustworthiness. Consequently, a confession induced by promises or threats is always inadmissible on the theory that an involuntary confession is unreliable. 2 East, *Pleas of the Crown* 657–658 (1803). Moreover, under modern practice, judges have discretion on grounds of fairness and prejudice to exclude any statement made by a defendant when he has not been advised of his rights during a police interrogation. Gotlieb, *Confirmation by Subsequent Facts*, 72 L. Q. Rev. 209, 223–224 (1956); Archbold, *Criminal Pleading, Evidence and Practice*, § 1388 *et seq.* (38th ed.), and cases there cited.[26] However—and this is crucial—the English exclusionary rule is never extended to render inadmissible the fruits of statements unlawfully obtained. It has long been held that, even where a confession is plainly inadmissible, "anything that confession led to may be given in evidence." *The Queen* v. *Leatham*, 8 Cox Crim. Cas. 498, 503 (Q.B.) (1861) (Crompton, J.).

[26] The English procedural rules for custodial interrogation, known as the "Judges' Rules," were cited with approval in *Miranda*, *supra*, 384 U.S. at 486–488. Referring to these rules, the Court stated in part (*id.* at 488, n. 57): "[D]espite the fact [that] some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system."

In the early case of *The King* v. *Warickshall,* 1 Leach 263, 168 Eng. Rep. 234 (1783), the defendant had made an inadmissible statement revealing where she had hidden certain stolen property and the property was found at the location so disclosed. The court rejected the defendant's contention that proof of that discovery should not have been given, holding that subsequent acts done in consequence of an inadmissible confession could properly be proved at trial.

A similar result was reached in *The King* v. *Lockhart,* 1 Leach 386, 168 Eng. Rep. 295 (1785). There, the defendant acknowledged under interrogation that he had stolen the property in question and stated that he had disposed of it to one Grant. At trial, the defendant asserted that, since his own statement could not be received in evidence, Grant's testimony was similarly incompetent. The court held: "[A]lthough a confession improperly obtained cannot be given in evidence, yet it can never go to the rejection of the evidence of other witnesses, which are got at in consequence of such a confession" (1 Leach at 387).

A recent statement of this rule is to be found in *Commissioners of Customs and Excise* v. *Harz,* [1967] A.C. 760, [1967] 1 All Eng. Rep. 177. There, the defendant was charged in a criminal case with the evasion of a purchase tax. During the course of the investigation, the defendant was advised erroneously that if he did not respond to questions put to him, he would be prosecuted for his failure to do so. The

admissions so elicited were introduced at his trial. The House of Lords held that a conviction obtained as a result of these admissions could not be upheld, since the statutory power of compulsion did not extend to these statements. Lord Reid said: "The appellants' first argument was that relevant evidence is always admissible, even where the prosecution obtained it by illegal means. There is authority to that effect where the evidence is real evidence—some object like a blood-stained knife which was only discovered because the accused was compelled by illegal means to say where it was hidden. But that has no application to confessions which for some three centuries have been held to be inadmissible unless they are free and voluntary" ([1967] A.C. at 817).

There is no indication of a present English trend to exclude evidence derived from inadmissible statements. On the contrary, there appears to be some pressure to admit even improperly obtained statements, if they are corroborated as a whole or in part by subsequently discovered facts. See Gotlieb, *supra,* 72 L.Q. Rev. at 209–210. The most recent case on the subject holds that reliability is the primary standard of admissibility, and that English law therefore permits the admission in evidence of information supplied by the defendant, if that information has led to the discovery of a relevant fact. Consequently, the derivative evidence is admissible, along with any part of the defendant's statement which it corroborates. *The*

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*Queen* v. *Ramasamy*, [1965] A.C. 1, 12–15 (P.C.) (Ceylon).[27]

The key theme to be gleaned from these cases is that they renounce the "fruits" doctrine as an inexorable consequence of the rule excluding illegally obtained confessions or statements. We advocate no more when we urge that consideration of neither logic, history nor policy require any different rule where leads are obtained as a result of interrogations which may be voluntary but are nonetheless not conducted in full compliance with *Miranda*.

5. The analysis we urge here on constitutional and policy grounds is not foreclosed by the holding in *Miranda*. Although the opinion in *Miranda* expressly dealt with almost every aspect of the issues raised by statements made during informal custodial interrogation—including such matters as the admissibility of exculpatory statements (384 U.S. at 477) and the admissibility of "circumstantial evidence" to show that the defendant was aware of rights even though not expressly advised of them (*id.* at 471–472)—it did not allude to the fruit of the poisonous

[27] The Scottish and Irish courts follow exclusionary rules somewhat similar to the English rule, but those jurisdictions, like the United States, also recognize deterrence, as well as reliability, as a factor to be considered in adjudging the admissibility of evidence. See *Lawrie* v. *Muir*, 1950 Scots L.T.R. 37, 40. Accordingly, various tests are considered in determining the use of improperly obtained evidence, among them whether the irregularity was merely technical or constituted a serious invasion of the defendant's rights. See, *e.g.*, *H. M. Advocate* v. *Turnbull*, 1951 Scots L.T.R. 409; *People* v. *O'Brien*, [1965] Ir. R. 142; Heydon, *Illegally Obtained Evidence* (*1*), 1973 Crim. L. Rev. 603, 608.

tree doctrine. On the contrary, the Court made clear in the opening paragraph of its opinion that it was "deal[ing] with *the admissibility of statements* obtained from an individual who is subjected to custodial police interrogation * **" (*id.* at 4439; emphasis added.)[28]

Later guidelines offered by this Court, moreover, support our submission that the *Miranda* exclusionary rule is not absolute and all-embracing. In *Harris* v. *New York*, 401 U.S. 222, 224, the Court expressly cautioned that *Miranda* must not be read over-broadly to bar all uses of uncounseled statements, but that only the portions of the majority opinion necessary to the result are to be regarded as controlling.

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[28] It is true that the *Miranda* majority stated, "unless and until * * * warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]" (384 U.S. at 479; emphasis added). Two of the dissenters evidently feared the application of the "fruit of the poisonous tree" doctrine to *Miranda* violations. See 384 U.S. at 500 (Clark, J.); cf. 384 U.S. at 545 (White, J.). However, even if the quoted phrase in the majority opinion was intended to refer to derivative evidence, the statement must be considered dictum, since none of the *Miranda* cases involved the use of "fruits" of unlawfully obtained statements.

There has, moreover, been doubt among legal scholars that the Court could have intended in one casual sentence to dispose of the complex question of the scope of the exclusionary rule devised in the *Miranda* decision. Judge Friendly reads "evidence obtained as a result" to mean the statements made during an unlawful interrogation, rather than evidence derived from leads developed during a period of improper questioning. Friendly, *Benchmarks*, *supra*, at 279. See also George, *Interrogation of Criminal Defendants—Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 169, 193 (1966).

As the Court pertinently stated in *Harris* (*id.* at 224):

> Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

So here, there is no reason to question the truthworthiness of the testimony of the man respondent hoped would supply an alibi, who in any event was subject to full cross-examination at trial. See *Dutton* v. *Evans*, 400 U.S. 74; *California* v. *Green*, 399 U.S. 149; *Davis* v. *Alaska*, No. 72–5794, decided February 27, 1974.[29]

[29] We do not contend that the fruits of illegally obtained statements should never be excluded. When the *Miranda* violation consists of deliberate and flagrant abuse of the accused's constitutional rights, amounting to a denial of due process, application of the exclusionary principle would appear warranted. See Friendly, *Benchmarks*, *supra*, at 260–261, 282. However, where, as here, the *Miranda* violation is merely a technical one and no actual constitutional violation is alleged or proved by the defendant, exclusion of the statement alone is sufficient to serve the purposes of deterring illegal conduct and ensuring the trustworthiness of evidence for which the *Miranda* exclusionary rule was fashioned.

## CONCLUSION

The judgment of the court of appeals should therefore be reversed.

Respectfully submitted.

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# MOTION

FILED

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No. 75-426

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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STATE OF MICHIGAN,
*Petitioner,*

vs.

THOMAS W. TUCKER,
*Respondent.*

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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## MOTION OF WOMEN LAWYERS ASSOCIATION OF MICHIGAN FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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AMERICAN BRIEF AND EXC
GRAND RAPIDS,

No. 73-482

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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STATE OF MICHIGAN,
*Petitioner,*
vs.
THOMAS W. TUCKER,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## MOTION OF WOMEN LAWYERS ASSOCIATION OF MICHIGAN FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

Now comes the Women Lawyers Association of Michigan, by and through its attorneys Kathleen Copeland and Clarice Jobes, and moves this Honorable Court for an Order granting leave to submit a brief *amicus curiae* in support of Respondent in the above-captioned cause for the following reasons:

1. The Women Lawyers Association of Michigan is an unincorporated voluntary association of women attorneys licensed to practice in the State of Michigan. The Association is the sole association of women lawyers in Michigan and was founded in 1919. Its objects include advancing the interests of women members of the legal profession as well as advancing the position of women in general as they are affected by the law.

2. The Association has a special interest in the subject matter of the case at bar in that the brunt of protecting the legal rights of women, including women victims of crime, increasingly falls upon women attorneys. Correlatively, the Association has an equal interest in protecting and preserving the existing constitutional rights of all criminal defendants.

3. The defendant in this cause was charged with the crime of rape, an offense which is perpetrated on women, and with which the Association has great concern. Because of the brutality of the offense in this case, the Association seeks leave to submit a brief *amicus curiae*, believing that dispassionate review of the record is of supreme importance, as did Mr. Justice Clark in *Gallegos v. Colorado*, 370 US 49, 55, 83 S Ct 1209 (1962), when he quoted Chief Justice John Marshall:

> "[i]f courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined."

4. The Association has a strong interest in seeing that the protection of women victims of crime is not accomplished by depriving criminal defendants of constitutional guarantees. It believes that the guarantees set forth in *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602 (1966), must continue to be applied to all criminal defendants equally, regardless of the nature of the crime they have committed. The Association concurs with Mr. Justice Harlan who has said:

> "We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case."
>
> *Desist v. United States*, 394 US 244, 258, 89 S Ct 1030 (1968).

5. If such leave is granted, the Association joins with and adopts by reference the Brief of Civil Liberties Com-

mittee, State Bar of Michigan as Amici Curiae in Support of the Respondent.

WHEREFORE, the Women Lawyers Association of Michigan prays this Court:

A. Issue an Order Granting Leave to Submit a Brief Amicus Curiae in the above captioned cause.

B. Adopt by reference the Brief of Civil Liberties Committee, State Bar of Michigan as Amici Curiae brief of the Women Lawyers Association of Michigan in Support of the Respondent.

Respectfully Submitted,

(s) Kathleen Copeland

(s) Clarice Jobes

*Co-counsel, Women Lawyers Association of Michigan*